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In the

Supreme Court of the United States.

October Term, 1935.

No. 218

The Atlantic Lumber Company,

Appellant,

v.

Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS.

ROBERT C. McKAY,
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In the

Supreme Court of the United States.

October Term, 1935.

No.

THE ATLANTIC LUMBER COMPANY,

APPELLANT,

v.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS,

APPELLEE.

BRIEF OPPOSING MOTION TO DISMISS.

Short Statement of the Case.

This is an appeal from an order of the Supreme Judicial Court of the Commonwealth of Massachusetts affirming a decision of the Massachusetts Board of Tax Appeals. The appellant is a Delaware corporation engaged in the business of dealing in lumber at wholesale. It carries on business in part within the Commonwealth of Massachusetts, but it is contended that such part of its business so carried on in Massachusetts is exclusively interstate commerce. The Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts assessed an excise tax to the appellant for the year 1932 under chapter 63 of

the General Laws of the Commonwealth of Massachusetts. This tax was paid by the appellant, and an application for abatement was seasonably filed pursuant to the provisions of said chapter 63. This application for abatement was denied and the appellant appealed to the Massachusetts Board of Tax Appeals pursuant to the provisions of chapter 58A of the General Laws of the Commonwealth of Massachusetts. In this appeal there was drawn in question the validity of chapter 63 of the General Laws of the Commonwealth of Massachusetts on the ground that it was repugnant to the Constitution of the United States and the decision was in favor of its validity. From this decision the appellant appealed to the Supreme Judicial Court of the Commonwealth of Massachusetts, assigning as error the conclusion of the Massachusetts Board of Tax Appeals that said chapter 63 was valid and not repugnant to the Constitution of the United States. The decision of the Supreme Judicial Court was also in favor of the validity of said chapter 63, and the appellant in this appeal has assigned such decision as error.

Argument.

I.

The statement of the appellee does not disclose any matter or ground making against the jurisdiction of this Court asserted by the appellant.

The sole ground advanced by the appellant in support of his motion to dismiss is that there is no merit in the appeal. It is submitted that this is not "any matter or ground making against the jurisdiction of this Court" under paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.

II.

The Federal questions in this case are ones which require analysis and exposition for their decision.

The statement of the appellee supporting his motion to dismiss asserts that the single issue calling for determination is whether the appellant was carrying on a local business within the Commonwealth of Massachusetts, and that this question was decided by the case of *Cheney Bros.* v. *Massachusetts,* 246 U.S. 147. The appellant does contend that the business activities the Supreme Judicial Court of Massachusetts has held to be local business are purely incidental to its interstate business, but it also contends that chapter 63 of the General Laws of Massachusetts, as construed by the Supreme Judicial Court of Massachusetts and administered by the Commissioner of Corporations and Taxation, is invalid as placing a direct burden on interstate commerce and levying a tax on property situated without the limits of the Commonwealth of Massachusetts. These issues were both raised in the pleadings before the Massachusetts Board of Tax Appeals and in the assignment of errors to the Supreme Judicial Court. Both were decided adversely to the appellant by the Supreme Judicial Court, and are included in the assignment of errors in this appeal.

That the case of *Cheney Bros.* v. *Massachusetts,* 246 U.S. 147, and more particularly the portion of that decision dealing with the Copper Range Co. and the Champion Copper Co., cannot be given the effect ascribed to it by the Supreme Judicial Court and the appellee has been clearly pointed out in *Ozark Pipe Line Corp.* v. *Monier,* 266 U.S. 555, where, at pages 565 and 566, this Court said:

> "The Court below grounded its decision chiefly upon Cheney Bros. Co. v. Massachusetts, 246 U.S. 147; but a review of that case will clearly demonstrate that it

cannot be given the effect thus ascribed to it. Seven foreign corporations sought to avoid a Massachusetts excise tax on the ground, among others, that, as imposed, it contravened the Commerce Clause of the Constitution. This Court held the tax invalid as to one of the corporations and sustained it as to the other six. The first of the six kept a stock of machine parts in the State which were sold both within and without the State, and the Court simply held that the portion of the business which was purely local was subject to local taxation. The second did an extensive local business in repairing cars of its own make and in selling second-hand cars. The third employed salesmen who took orders for its product from local retailers and turned them over to be filled by the nearest wholesaler, and this amounted, as the court said, simply to one local merchant buying from another. The fourth and fifth were mining companies operating mines in Michigan with offices in Boston where their directors met, declared and paid dividends, etc. Interstate commerce was not affected. Indeed, it does not affirmatively appear that there was any such commerce to be affected. . . . It will thus be seen that there is nothing in this decision upon which the decree under review can properly rest. Its effect is entirely the other way."

The taxing statute involved in the case of *Cheney Bros.* v. *Massachusetts* was radically different from the statute in the case at bar. No attempt was made to allocate the value of the corporate franchise on the basis of interstate sales made by salesmen sent out from a Massachusetts office. Chapter 63 of the General Laws of the Commonwealth of Massachusetts, under which the tax in the case at bar was assessed, was before this Court in *Alpha Portland Cement Co.* v. *Commonwealth,* 268 U.S. 203. In

holding the tax invalid as a burden on interstate commerce, this Court, at page 218, said:

> "It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax."

The facts in the case of *Alpha Portland Cement Co.* v. *Commonwealth* and the case at bar are substantially identical except that in the Alpha Portland Cement Co. case the corporation was admittedly engaged exclusively in interstate commerce within Massachusetts. In the case at bar the Court has held that certain of the business activities of the appellant were not interstate commerce nor incidental to interstate commerce, which ruling has been assigned as error.

Wherefore your appellant submits that the motion to dismiss should be denied.

Respectfully submitted,

ROBERT C. McKAY,

Attorney for Appellant.